



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.



SIGNATURE

DATE: 19 February 2024

Case No. 9074/2020

In the matter between:

**GAUTENG PROVINCIAL GOVERNMENT: DEPARTMENT
OF HUMAN SETTLEMENTS**

First Applicant

SIZAKELE KHANGALE

Second Applicant

SYDWELL KHANGALE

Third Applicant

and

NKOSIWATI BUSHA

First Respondent

BUSISIWE BERLINA BUSHA

Second Respondent

REGISTRAR OF DEEDS, JOHANNESBURG

Third Respondent

CHIEF SURVEYOR GENERAL

Fourth Respondent

CITY OF JOHANNESBURG

Fifth Respondent

JUDGMENT

WILSON J:

- 1 The applicant is the Gauteng Provincial Department of Human Settlements (“the Department”). In 1998, the Department acquired and developed a substantial tract of land in Lenasia, to the south of Johannesburg, as a low cost housing project. The terms of the project were governed by the National Housing Subsidy Scheme (“the Scheme”), which facilitated the construction of a large number of what are colloquially known as Reconstruction and Development Plan – “RDP” – houses.

- 2 Broadly speaking, the Scheme worked by allocating a subsidy to each of its beneficiaries. The subsidy would then be used to pay for the bulk of the cost of acquiring land and constructing a house. The individual beneficiary would contribute a small portion of the cost of constructing the house once they had been able to take occupation of it. Construction projects were normally funded by aggregating a number of qualifying beneficiaries’ housing subsidies, and paying them over to a developer who would construct large housing projects to predetermined specifications on land the Department acquired. This aggregation of subsidies allowed the developer and the state to benefit from economies of scale, with the aim of building as many houses as possible, and accordingly benefitting as many beneficiaries as possible, in one project. In this way, RDP houses were built at scale in uniform style.

- 3 The Scheme generally resulted in the transfer of ownership of a parcel of land and a house constructed on it to each qualifying beneficiary. This meant that part of the development process involved the establishment of a township and its subdivision into erven of roughly similar size. Each erf had a house erected

on it. However, given the scale of these construction projects – which sometimes involved several thousand units – things sometimes went wrong. A lack of transparency in the housing allocation process led to conflicts between the state, subsidy applicants and others in need of housing, and to the occupation of RDP units without the state's permission (see, for example, *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* 2014 (3) SA 23 (SCA)). Sometimes, whether by mistake or malfeasance, the state gave RDP units to people who were not entitled to them (see *Thubakgale v Ekurhuleni Municipality* 2022 (8) BCLR 985 (CC)).

4 In this case, the Department approaches me to correct what it says is one of these mistakes. The Department says that it erroneously transferred ownership of two RDP housing units, and the land on which they stand, to the first and second respondents, the Bushas. The Bushas applied for, and received, a housing subsidy. In 1997 they were allocated an RDP house at Erf 11602 Lenasia Extension 13. At around the same time, however, the second and third applicants, the Khangales – who were themselves RDP subsidy beneficiaries – were also allocated an RDP house, adjacent to the Bushas' unit, that was constructed on the same Erf. The Khangales moved into their house in December 1998, and the Bushas occupied their unit in February 1999.

5 Some fifteen years later, in 2014, the whole of Erf 11602 – just under 646 square metres of land – was transferred to the Bushas. This included the land upon which the Khangales' house stood. The Department says that was its error. It did not intend to transfer the whole of Erf 11602 to the Bushas. It

instead intended to subdivide the Erf into roughly equal plots, to transfer the plot on which the Khangales' house stands to the Khangales, and to transfer the plot on which the Bushas' house stands to the Bushas.

6 The third respondent, the Registrar of Deeds, has refused to rectify what the Department says was its mistake without an order of court. Accordingly, the Department approaches me under section 6 of the Deeds Registries Act 47 of 1937, and asks that I cancel the deed under which the whole of Erf 11602 was transferred to the Bushas. The effect of such an order would be that registration of the Erf would revert to the Department, which owned the Erf before it was transferred to the Bushas. The Department then intends to divide the Erf between the Khangales and the Bushas and transfer to each of them the portion to which they were originally entitled.

7 The Bushas resist the application fiercely. They say that they were always entitled to the whole Erf. The real mistake, they say, was the construction of the Khangales' dwelling on their land, not the transfer of the Erf to the Bushas. The Bushas have brought an application to evict the Khangales from the Erf. That application has been held in abeyance pending the matter presently before me.

8 In an effort to defend what they say is their title to their half of Erf 11602, the Khangales brought an application to reverse what they called the unlawful consolidation of Erf 11602 in the Bushas' name. That application failed before Thobane AJ, on the basis that there had never been such a consolidation, and so it was impossible to reverse it. I think Thobane AJ was right to reach that conclusion. The true situation was, as I have said, that the whole Erf was

transferred to the Bushas. Even though the Khangales occupy half of it, the Khangales have never had title to any part of the Erf.

- 9 The question before me, then, is whether I should exercise my powers under section 6 of the Deeds Registries Act to cancel the transfer of the property to the Bushas. Section 6 grants me an implicit but apparently wide-ranging power to cancel deeds registered against immovable property (see *Kuzwayo v Representative of the Executor in the Estate of the Late Masile* [2011] 2 All SA 599 (SCA), paragraph 26).
- 10 However far that power extends, at its very core must be the power – and, in an appropriate case, the duty – to cancel deeds registered by mistake. South Africa operates a negative system of deeds registration. That means that the deeds register is not conclusive evidence of its own correctness. In other words, the register may be corrected where there is legal cause to do so. This is to be contrasted with positive systems of deeds registration, where the registration and the existence of an ownership right are more or less the same thing.
- 11 In South Africa, ownership of a particular plot of land is only valid if it is lawfully acquired. Ordinarily, ownership passes from one person to another on the implementation of what is known as the “real agreement”. The real agreement is embodied in the giving and receiving of possession of a thing with a mutual intention to transfer ownership of it. In *Commissioner of Customs and Excise v Randles Brothers* 1941 AD 369, at 398, it was held that “[o]wnership of movable property does not in our law pass by the making of a contract. It passes when delivery of possession is given accompanied by an intention on

the part of the transferor to transfer ownership and on the part of the transferee to receive it. If it is delivered in pursuance of a contract of sale, the ownership may pass at the time of delivery or it may not. Conditions may occur in the contract of sale which will delay or, if they are not fulfilled, altogether prevent the passing of ownership . . . whether or not an intention to transfer ownership by delivery exists is a question of fact, not of law.”

- 12 This “abstract” theory of transfer – that a change in ownership of a thing does not depend on the validity of an underlying contract, but upon the overriding intention of the parties to pass ownership while transferring possession – also applies to immovable property, such as land (see *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA) paragraphs 21 and 22). Ownership passes when land is registered in the name of the transferee pursuant to the transferor’s intention to pass ownership, and the transferee’s intention to receive it. For the purposes of passing land ownership, possession is transferred symbolically by the registration of a deed. But registration without the intention to pass ownership has no legal consequence.
- 13 It follows from all of this that the mere registration of Erf 11602 in the Bushas’ names was not enough, in itself, to secure their ownership of it. What was required, in addition, was the Department’s intention to transfer ownership of the whole Erf exclusively to the Bushas.
- 14 Although the Bushas claim that this was the Department’s intent all along, the undisputed facts tell a different story. The developer of the Erf, acting on the Department’s instructions, built two housing units on the Erf. The Department approved the Khangales’ housing subsidy, used it to build one of the two

houses constructed on the Erf, and then gave them possession of that house. The Erf is unusually large. On the Bushas' own version, the developer told them that the Erf was too big to have just one house constructed on it. The Bushas are unable to point to any single-dwelling plots of a similar size anywhere else in the township (it was originally said, in the Bushas' answering affidavit, that there were such plots, but the Department, in reply, confirmed that the plots to which the Bushas adverted were at best around two thirds the size of Erf 11602).

15 Accordingly, there can be no serious dispute that, even though it transferred the whole of Erf 11602 to the Bushas, the Department never intended to do so. It committed an administrative error. What the Department really intended to do was to subdivide the Erf into roughly equal portions, and transfer one portion each to the Khangales and to the Bushas. The absence of any intent to transfer the whole Erf to the Bushas means that there was never a real agreement to transfer the Erf, and ownership never truly passed to the Bushas. The correct position in law is that the Department still owns the Erf, and the deeds registry must be corrected to reflect that reality.

16 For all these reasons, the application must succeed and the deed transferring Erf 11602 to the Bushas must be cancelled.

17 The Department also asks that it be exempted from producing a rates clearance certificate under section 118 of the Local Government: Municipal Systems Act 32 of 2000 to facilitate the retransfer of the Erf. But the Department is already exempted from producing such a certificate by operation of law, because section 118 (4) of the Act dispenses with the need

to produce a certificate in the case of “a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by the national government, a provincial government or a municipality”. Interpreted purposively, section 118 (4) must also apply to any retransfers necessary to convey a property to the person originally intended to benefit from it. The mere cancellation of the deed ought also, in theory, be enough to facilitate the retransfer of the property without the production of a clearance certificate. The Department also asks that I declare that the Erf was erroneously registered in the Bushas’ names and that I direct the Bushas to sign such documents as may be necessary to effect the retransfer of Erf 1106 to it. Again, this is not strictly necessary. The effect of my order cancelling the deed will be that, legally speaking, the transfer never happened.

18 Nonetheless, transfer of land, even when authorised by court order, is a notoriously bureaucratic affair. I would rather risk superfluity in my order than set the parties up for future administrative wrangling. This dispute has been twenty years in the making. The sooner the Department’s original intent is given effect to, the better for everyone involved. I will accordingly grant the ancillary relief the Department seeks.

19 I think each party must pay their own costs. It is true that the Bushas have snatched at a bargain that was never really theirs for the taking, and that their opposition to this application was wholly untenable. However, the fundamental cause of this dispute was the Department’s error. I do not think it would be right to make the Bushas pay for what is, at bottom, the Department’s

ineffectual implementation of a housing project meant to benefit the Khangales, the Bushas and other poor and vulnerable people in need of housing assistance. It also strikes me that the Department has never really explained how the error it asks me to correct occurred. It is successful in this application only because the situation on the ground is wholly inconsistent with any other explanation. There are limits to the criticism that can fairly be directed at the Bushas in these circumstances.

20 Accordingly –

20.1 It is declared that Erf 11602 Lenasia Extension 13, Registration Division IQ, Gauteng, was erroneously registered in the names of the first and second respondents.

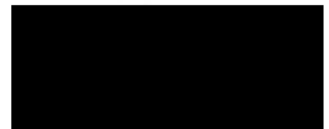
20.2 The Deed of Transfer number T23451/2014, registered against Erf 11602 Lenasia Extension 13, Registration Division IQ, Gauteng, is cancelled.

20.3 The first and second respondents are directed to sign all such documents as may be necessary to register Erf 11602 Lenasia Extension 13, Registration Division IQ, Gauteng, in the first applicant's name.

20.4 In the event that the first and second respondents fail or refuse to comply with the order in paragraph 20.3, the Sheriff of this Court is authorised to sign the necessary documents on their behalf.

20.5 The first applicant is exempted from producing a rates clearance certificate in order to transfer Erf 11602 Lenasia Extension 13, Registration Division IQ, Gauteng back into its name.

20.6 Each party will pay their own costs.



S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 19 February 2024.

HEARD ON: 13 February 2024

DECIDED ON: 19 February 2024

For the Applicants: N Kakaza
Instructed by Raborifi R Inc

For the First and
Second Respondents: O Mudimeli
Instructed by Legal Aid South Africa